No. 9506

In The United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ILENE WARREN alias
"SPEED" WARREN,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

BRIEF OF APPELLEE

On APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

CHAS. E. CASSIDY and
KENNETH E. YOUNG,
Attorneys for Appellee.

Filed this ..... day of October, 1940.
PAUL P. O'BRIEN, *Clerk,*

By.....
Deputy Clerk.

SUBJECT INDEX

OTHER REFERENCES

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Statement Disclosing Absence of Jurisdiction

The record herein shows with regard to the perfecting of the appeal herein, that the original decision and judgment of the Supreme Court of the Territory of Hawaii in this cause was filed on October 20, 1939 (Record p. 668). The Appellant thereafter filed in the Supreme Court a petition for a rehearing (the petition does not appear in the record). On November 25, 1939, the Supreme Court dismissed the petition for a rehearing on the ground that the Court had no jurisdiction to entertain the petition (Record pp. 669–71). On February 20, 1940, application was made to a Justice of the

Supreme Court for an appeal from the judgment of the Supreme Court of the Territory of Hawaii, filed on October 20, 1939 (Rec. pp. 6–7).

JURISDICTIONAL POINT

Appeal Should Be Dismissed For Lack of Jurisdiction.

The question of jurisdiction is one that can be raised at any time and an appeal may be dismissed, because of lack of jurisdiction, on the court's own motion.

Mansfield, C&L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462.

The Taigen Maru, 73 Fed. (2d) 922 (9th C.C.A.).

A

When an Appellate Court has no Jurisdiction to Entertain or Consider a Petition for Rehearing, the Mere Filing of a Petition for Rehearing Followed by a Decision by the Appellate Court Stating that it has no Jurisdiction to Consider the Petition for Rehearing, Cannot Operate to Extend the Time Allowed to Appeal from the Original Judgment.

The Appellee contends herein and suggests to this Court that it has no jurisdiction to entertain the appeal in this cause for the reason that the application for the appeal herein was not duly made within three months after the entry of the judgment appealed from therein.

Section 230, Title 28, U.S.C.A., provides as follows:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of

appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

It is well settled that the time within which an application for an appeal must be made is a jurisdictional requirement and when such requirement is not met, the appeal must be dismissed.

Northwestern Public Service Co. v. Pfeifer, 36 Fed. (2d) 5 (8th C.C.A. '29).
von Holt v. Carter, 56 Fed. (2d) 61 (9th C.C.A. '32).

Rule V of the Supreme Court of the Territory of Hawaii, 34 Haw. 958, with reference to a rehearing provides as follows:

> "A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave additional time is granted during such twenty days by the court or a justice thereof; and shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled."

It is apparent then that the application for the appeal herein was not duly made within three months after the entry of the judgment of the Supreme Court filed on October 20, 1939. However, the application for the appeal herein was made within three months after the dismissal of the petition for a rehearing filed November 25, 1939 (Record p. 671).

It is the contention of the Appellee that the mere

filing of the petition for a rehearing in the Supreme Court under these circumstances was not sufficient to toll the statute, *(Title 28, U.S.C.A. Sec. 230)* for the reason that the Supreme Court of the Territory of Hawaii never entertained the petition because the court had no jurisdiction to entertain it.

In its decision dismissing the petition for a rehearing the Supreme Court of the Territory of Hawaii stated (Record p. 670),

> "Appellant having failed to obtain a recall of the mandate leaves this court wholly without jurisdiction and the petition for rehearing submitted herein, should be and is dismissed."

That the Supreme Court of the Territory of Hawaii under Rule V of Court, supra, and under the well settled general principle of law had no jurisdiction to entertain the petition for rehearing after the mandate had been returned to the lower court is sustained by the following authorities:

Browder v. M'Arthur (1822), 7 Wheat. 58, 5 L. Ed. 397.

Peck v. Sanderson (1855), 18 How. 42, 15 L. Ed. 262.

A petition for rehearing if seasonably filed and entertained suspends the time limited for an appeal until the petition is disposed of on its merits.

Texas Pac. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. Ed. 492.

The Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986.

Thomas Day Co. v. Doble Laboratories, 41 Fed. (2d), 51 (9th C.C.A. '30).

It is the plain inference and intendment of these decisions that something more than mere filing of a petition for rehearing is necessary to suspend the time for filing an appeal from the final judgment of the court.

Klein v. So. Pac. Co., 140 Fed. 213 (C.C.D. Ore. '05).

Cambuston v. U. S., 95 U. S. 285, 24 L. Ed. 448.

Morse v. U. S., 270 U. S. 151, 70 L. Ed. 518.

Gypsy Oil Co. v. Escoe, 275 U. S. 498, 72 L. Ed. 393.

Analogous case:

O'Gwin v. U. S., 90 Fed. (2d) 494 (9th C.C.A.).

There is no question in the case at bar that the petition for rehearing herein was filed within the time required by Rule V of the Supreme Court. The sole issue is whether or not a petition for a rehearing can be entertained by the Supreme Court within the meaning of the rules set out in *Texas Pacific Ry. Co. v. Murphy, supra,* when the Supreme Court is entirely without jurisdiction to grant or deny the petition for a rehearing on its merits.

As to when a petition for a rehearing is *entertained* by a court and the exact meaning in this connection of the word "entertained" there is some judicial doubt and uncertainty as expressed by this court in *Thomas Day Co. v. Doble Laboratories, supra,* at page 52.

As a general principle of law, however, we submit the proposition as being elementary, that when a court

has no jurisdiction to hear a petition for rehearing on its merits it cannot entertain the petition for any purpose and the mere statement of the court in dismissing a petition for a rehearing on the ground that it had no jurisdiction to consider the petition should not be construed as being an "entertainment" of the petition by the court.

As said in the *New Orleans and Bayousara Mail Company v. Fernandez, et al.,* 12 Wall 130 (U. S.) 20 L. Ed. 249 at p. 251:

> "Where the Circuit Court is without jurisdiction, it is in general irregular to make any order in the cause except to dismiss the suit."

We therefore submit that this court has no jurisdiction to entertain the appeal herein for the reason that the application for the appeal was not duly made within the three months period required by the statute.

If the court is of the opinion that jurisdiction to entertain this appeal exists, then for the reason hereafter stated the Appellee presents a

STATEMENT OF FACTS

Although the statement of facts as presented by the Appellant is not flatly controverted by the Appellee, that statement is in a sense inaccurate in that it omits material portions of the evidence. The Appellee therefore feels constrained to present a more complete statement of facts in order that the issues raised may be better understood.

A summary of the salient facts brought out on the trial of this cause are as follows:—

On or about June 1, 1936 (Record pp. 65, 79), the Appellant was keeping a house of ill-fame on Muluwai Street in Wahiawa, City and County of Honolulu (Record pp. 58, 153-54) and working for her as prostitutes at that time were Lou Rodgers and two other girls (Record p. 155). On that date in the evening the Appellant and the three girls, one of whom was Lou Rodgers, were taken from the Appellant's house on Muluwai Street to the police station in Honolulu by a police officer, Perry W. Parker (Record pp. 65-67, 69). While the Appellant and Lou Rodgers were in the dormitory at the Police station (Record pp. 85-86, 135-36, 130) and again about two days to one week after the incident of June 1st (Record pp. 86, 137), the Appellant told Lou Rodgers, in discussing the raid of June 1st, that she wanted to wire the place with electricity (Record p. 86) as it would keep drunken soldiers, burglars and the police away (Record (pp. 87-88, 90, 134).

A short time after these two conversations, the Appellant spoke to John Kiehm, an automobile mechanic, (Record pp. 88-89, 156) and to another (Record pp. 89-90) about the installation of an electrical shocking device on the front door (Record pp. 167, 171), and that thereafter the Appellant obtained wiring and a metal plate (Record p. 96), which was installed by John Kiehm who placed the metal plate at the request of the Appellant on the outside of the front door (Record

p. 101) on or about July 11, 1936 (Record pp. 167-169). Electric Current drawn from a 115 volt electric line (Record pp. 168, 236) was directed into a radio transformer (Record p. 168) which boosted the voltage to about 600 volts (Record p. 323) and from there into the metal plate on the front door. This shocking device installed by John Kiehm was controlled from a knife type switch (Record p. 185) located approximately three feet (Record p. 182) from the front door in the inside of the house (Record pp. 91, 102, 167-168, 171, 177). This shocking device when touched by a person making a ground was imminently dangerous to life (Record pp. 536, 529).

During the month of July or August, 1936, one Lucy McGuire worked as a maid (Record p. 207) for the Appellant while the Appellant was operating a house of prostitution (Record pp. 211-214). During the period of her employment there the Appellant discussed the matter of the electrically charged front door and the location of the switch with her, and the Appellant told her that it was to be used to scare soldiers and *in case of a raid* (Record pp. 214-215).

On August 3, 1937 (Record p. 313), the date of the crime charged in the indictment, the Appellant was keeping on the same premises on Muluwai Street a house of ill-fame and in her employ were one Billie Florence Penland (Record p. 333) and one Marjorie Scott (Record pp. 359, 369) who were working as prostitutes on that day. Billie Florence Penland had been told by the Appellant of the presence and the purpose

of the electrical shocking device on the door, to-wit, that it was to be used in case of a raid (Record pp. 282-3, 284).

On that date about 8:45 o'clock in the evening one E. J. Burns, a police officer of the City and County of Honolulu, dressed in civilian clothes (Record p. 242), was admitted to the house of the Appellant by Billie Florence Penland (Record p. 244) at the request of the Appellant who knew of the presence of E. J. Burns at the front door (Record pp. 315-317). Billie Florence Penland invited Officer Burns into one of the rooms on the first floor of the house, and after accepting three dollars ($3.00), and after Burns was completely undressed, disrobed herself, sat on the bed and offered herself for the purposes of prostitution (Record pp. 245-6, 276, 280). At this time there was stationed outside the Appellant's house but not on her premises (Record p. 395) a group of police officers of the City and County of Honolulu under the command of Police Captain Clarence Caminos, one of whom was the deceased, Wah Choon Lee (Record pp. 393, 394, 451). By a prearrangement between Officer Burns and Captain Caminos, it was understood that after Officer Burns had entered the house, if he made an arrest and needed some assistance, he was to blow a police whistle (Record pp. 266, 411, 413, 419, 422-23, 437) and the police on the outside of the premises were to enter and assist him. When Billie Florence Penland had, in the opinion of Officer Burns, committed an offense against the laws of the Territory, to-wit, an attempt to com-

mit prostitution (Record p. 270), he blew his police whistle and the group of officers under the command of Captain Clarence Caminos moved towards the front door of the defendant's house (Record p. 473). The officers upon reaching the door heard a commotion in the house (Record p. 429) and demanded admittance (Record pp. 261, 375, 452, 478, 511) but the door failed to open. After demanding entrance, the deceased, Wah Choon Lee, reached up to pull the door open (Record pp. 398, 453) and his hands came in contact with the metal plate on the front door. He fell backwards and was pronounced dead about fifteen minutes later (Record p. 449). At about the time the deceased touched the metal plate the Appellant was in the house and her arm was seen by Officer Burns near the switch controlling the shocking device (Record p. 303). The Appellant, a few minutes after the door was opened for the police, admitted to Billie Florence Penland that she had pulled the switch (Record pp. 322, 347-48, 350) by the front door (Record p. 322). The only external injury was an electric burn on the right thumb (Record p. 534). The cause of death was electrocution (Record p. 498).

ARGUMENT

The argument of the Appellant will be answered in the same order that the points have been raised by the Appellant in her Brief. For convenience, the points of law involved will first be set out, and under each point of law will be noted the assignments of error which

are covered by the point of law involved.

POINT I

Where a Police Officer Is Invited Into a House of Prostitution, Apparently Open to Any Prospective Customer, at the Request of the Person in Control Who Does Not Know He Is a Police Officer, the Police Officer May Testify as to What he Sees or Hears Therein.

A

Assignments of Error Covered

Assignments of Error No. III (Record p. 10, Appellant Br. pp. 23, 52) will be argued under the above point of law.

B

Appellant's Contention

Appellant contends (Appellant Op. Br. p. 24) that the evidence complained of in these assignments of error violated the Appellant's rights under the Fourth and Fifth Amendments of the Constitution of the United States because Officer Burns' entry into the house was made without a warrant and *without the consent of the Appellant* and because his identity as a police officer was not disclosed before his admission.

C

Appellee's Contention

The Appellee contends that the Appellant, operating a public nuisance, to-wit, a house of prostitution, open to the public generally, consented to and requested the

entry of Officer Burns into her house without inquiry as to his identity. That under these conditions no warrant or other lawful process was necessary as Officer Burns was lawfully upon the premises at the invitation of the Appellant, and that being lawfully upon the premises no constitutional rights of the Appellant under the Fourth and Fifth Amendments of the Constitution of the United States were violated by the admission of Officer Burns' testimony as to what he saw and heard in the house after his admission therein.

D

Review of Applicable Evidence

The following uncontradicted evidence shows that Officer Burns was invited into the Appellant's house at the Appellant's request:—

Testimony of Billie Florence Penland: (Record pp. 315-317.)

"Q. Will you state whether or not on August 3, 1937, you saw Mr. Burns at Mrs. Warren's place?

A. Yes, sir.

Q. Will you please tell the jury the circumstances that you first saw him there, how you happened to first see him?

A. Well, I had to let him in the door.

Q. Where were you when he was at the door?

A. I was upstairs and Mrs. Warren told me to go downstairs and let him in.

. . . . . .

Q. How did you know there was someone at the front door?

A. There was a knock at the front door and Mrs. Warren looked out the window.

. . . . . .

Q. What did she say to you, if anything?

A. 'Go downstairs and let him in.' She said it was O.K.

Q. You let him in?

A. Yes."

The uncontradicted evidence establishes that the house entered by Officer Burns was a house of ill-fame (Record pp. 333, 357-60).

That any person applying at the door of the Appellant's house and believed to be a customer would be admitted is inferentially established by the evidence (Record pp. 372-74).

E

Discussion of Cases Cited by Appellant

The Appellant relies principally upon the case of *Gouled v. U. S.*, 255 U. S. 298, 65 L. Ed. 647, 41 Sup. Ct. Rep. 261. In that case the facts were these:—Gouled was charged with conspiracy to defraud the United States. Error was claimed on the admission in evidence of a paper surreptitiously taken from the office of the defendant in his absence by a private pretending to make a friendly call, who was acting under the direction of the Intelligence Department of the Army of the United States. The paper was relevant to the issue made on the trial, and its admission was considered a violation of the Fourth Amendment.

The Supreme Court in that case said on *page 303 (L. Ed. p. 651):*

> "... Whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by *stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence* falls within the scope of the prohibition of the 4th Amendment, and therefore the answer to the first question must be in the affirmative." (Italics ours.)

This statement points out the basic facts upon which the court relied in its decision. In the case at bar, it is to be noted there was no stealth or fraud, but rather an actual invitation on the Appellant's premises; there was no entry or search in the *absence of the defendant;* there was no seizure of tangible evidence. The case at bar is clearly distinguishable from *Gouled v. U. S., supra.*

The *Gouled case, supra,* must be limited to its particular facts.

Olmstead v. U. S., 277 U. S. 438, 72 L. Ed. 944, 488 Sup. Ct. Rept. 564.

In that case the court in commenting on the Gouled case said, at *page 464:*—

> "Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. A repre-

sentative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the 4th Amendment. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of a defendant and the taking away of something tangible."

And again on page 465:—

"Justice Bradley in the Boyd Case, and Justice Clarke in the Gouled Case, said that the 5th Amendment and the 4th Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words 'search and seizure' as to forbid hearing or sight."

In *Amos v. U. S.*, 255 U. S. 313, 65 L. Ed. 654, 41 Sup. Ct. Rep. 266, relied upon by the Appellant, the facts were briefly these:—

The defendant was convicted of concealing whisky on which the tax had not been paid. At the trial he presented a petition asking that private property seized in a search of his house and store, "within his curtilage," without warrant, should be returned. This was denied. A woman, who claimed to be his wife, was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door, they entered and found whisky. Further searches in the house disclosed more. It was held that this ac-

tion constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whisky and to exclude the testimony was error.

In discussing the contention that the constitutional rights of the defendant were waived (which was the issue) Mr. Justice Clarke, speaking for the court, said on page 317 (L. Ed. p. 656):

> "The contention that the constitutional rights of the defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."

It can thus be seen that *Amos v. U. S., supra,* is also clearly distinguishable from the case at bar in that the court in the Amos case held there was implied coercion and hence no actual invitation by the defendant to go upon the defendant's premises. In the case at bar such a situation did not exist.

The case of *Terr. v. Ho Me,* 26 Haw. 331, also relied upon by Appellant, is not in point. There the facts were briefly that the government officers entered the defendant's home without a warrant under circumstances implying coercion. The question raised in that case was whether the defendant's action constituted a waiver by him of his constitutional privilege against unreasonable search and seizure. The court concluded

that the defendant in opening the door and permitting the officers to enter under the circumstances detailed by the witness did not operate as a waiver of his constitutional rights.

Finally the Appellant relies upon the case of *People v. Dent,* 19 N.E. (2d) 1020. It is apparent from a reading of that decision that the court primarily based its decision upon the lack of consent given to the officers by the defendant. The portion of the court's opinion quoted by the Appellant (Appellant's Br. p. 26) is mere dictum of the court so far as the consent feature is concerned. It is respectively submitted that the brevity of the opinion and the failure to cite authorities is indicative of the lack of careful consideration of the matter by the majority of the court. Chief Justice Shaw in his dissenting opinion and also Judge Stone in his dissenting opinion clearly outline the correct principles of law as laid down not only by the prior decisions of the Illinois court but also by the great weight of authority.

These cases then do not establish the contention of the Appellant that the testimony complained of in these assignments of error was admitted in violation of the Appellant's constitutional rights.

F

Authorities Supporting Appellee's Contention

The case of *Johnstone v. U. S.*, 1 Fed. (2d) 928 (9th C.C.A. '24) is illustrative of the common practice of allowing government agents to testify as to purchases

made after they have been invited on the premises of an establishment selling articles prohibited by law. In that case the defendant was convicted for violation of the National Prohibition Act. A government agent was allowed to testify as to three sales made to him by the defendant in the defendant's hotel room. The defendant moved to suppress such testimony because the officer had no search warrant. The court in denying the motion to suppress held that the officer could testify as to the purchases made by him.

In *Blanchard, et al. v. U. S.,* 40 Fed. (2d) 904 (5th C.C.A. '30), Cert. Denied 282 U. S. 865, 75 L. Ed. 765, the defendant was charged with the violation of the National Prohibition Act. The government was allowed to introduce testimony over the objection of the defendant of two government prohibition agents as to purchases of wine made by them from the defendant after being invited in the defendant's place of business. The court said, on *page 905,* when deciding that a search warrant was unnecessary:—

> "Under the circumstances, a search warrant was unnecessary, as the officers gained access to Blanchard's place of business by his invitation. When it came to their knowledge that the wine was intoxicating, they had the right to seize it without a search warrant."

Another case is *U. S. v. Smith,* 43 Fed. (2d) 173 (D. C. Texas). There the defendant was prosecuted for violation of the National Prohibition Act. At the trial government agents who had represented themselves as

customers for beer to the defendant and who had been invited into the defendant's premises where they saw others drinking beer and were sold beer by the defendant testified as to what they had seen and heard and found on the premises. The defendant moved to suppress all the evidence and the testimony of the officers as to what they had seen and heard and found on the grounds that this evidence violated the constitutional rights of the defendant under the Fourth and Fifth Amendments. The court, in overruling the motion to suppress, said on p. 174:

> "Defendant in his brief has entirely disregarded the controlling facts that the premises were being conducted as a public nuisance, and that liquor was sold therein to and in the sight of the officers, and has treated the matter as though it were a case of the entry by fraud or pretense of private property legitimately used for the purpose of a home and not as a place where liquor was sold and kept for sale, for the purpose of making an exploratory search for liquor which might be therein and the subsequent search of said premises. No such case is at all made here. . . .
>
> For the defendant to complain that his constitutional rights in the sanctity of his home have been invaded by an entry into his premises with his consent, for the avowed illegal purpose of buying liquor, followed by the sale of it thereon, appears to me, in view of the law which forbids the use of a man's premises for the sale of intoxicating liquor and declares such premises so used to be a public nuisance, to be grotesque, a 'reductio ad absurdum' in application, of a constitutional principle of profound dignity and importance; while the claim that the subsequent search without war-

rant, made by the officers after they had observed others drinking and had themselves purchased intoxicating liquor there, was unlawful, is contrary to the uniform current of authorities. *Jordan v. U. S.* (C.C.A.) 2 F. (2d) 598; *Sayers v. U. S.* (C.C.A.) 2 F. (2d) 146."

In *Marshall v. City of Newport* (Ky. '23) 255 S.W. 259, the defendant was charged with the running of a house of prostitution. Part of the testimony complained of consisted of that given by police officers of the city who visited the defendant's house, entered it and discovered evidence indicating that it had been and was then used as a house of prostitution. The defendant contended that these witnesses should not have been permitted to testify as to what they discovered in the house because the investigation conducted by them was without warrant or authority of law. The court said, on page 260, on passing on this contention as follows:—

"The officers had no search warrant, and admittedly no offense was committed in their presence, but their evidence shows, and it is not contradicted by appellant, that the entry into and the examination of the house was with the consent of appellant. In these circumstances the testimony was competent. *Com. v. Meiner,* 196 Ky. 840, 245 S.W. 890."

POINT II

Testimony Concerning the Subject Matter of an Illegal Search and Seizure, Which Is Based Upon Information Obtained From a Source Independent of the Illegal Search and Seizure, Is Not Ren-

dered Incompetent and Inadmissible Because the Authorities Responsible for the Search and Seizure Had Knowledge of the Subject Matter of the Search and Seizure and Questioned the Witnesses Giving the Testimony, Before Trial, in Regard Thereto.

A

Assignments of Error Covered

This point of law applies to Assignments of Error IV, V, VI (Rec. pp. 14-24 Appellant's Brief pp. 26-27, 55-64).

B

Review of Evidence Showing Nature and Source of Evidence Attacked

The evidence conclusively shows that the witnesses complained of testified at the trial from their own memory based on their observation of the equipment in the Appellant's house, unaffected by what happened at the police station when the equipment was exhibited to them.

It is singular that the Appellant in quoting portions of the testimony of each witness in her Brief, omitted material testimony showing the absence of the effect of the incident at the police station upon the testimony given by these witnesses at the trial, for example:—

(1) Concerning Assignment of Error IV

The testimony of Lou Rodgers on this issue (the subject matter of Assignments of Error of No. IV) on redirect examination was as follows:—

"Redirect Examination by Mr. Young (Rec. pp. 151-2):

Q. Miss Rodgers, when the police had you at the police station shortly after the death of Wah Choon Lee you say they had some electrical equipment in there?

A. They did.

Q. And did they ask you if that equipment was the same as was in there when you were there?

A. They asked me, yes.

Q. And that was how they got the lead?

A. Yes.

Q. And then they questioned you about what they knew personally about the equipment?

A. They did.

Q. How you knew it was in the house and how it was put in there and all such things?

A. They did.

Q. And everything you told the police was based upon your memory and your own observation and not upon what you saw in the police station?

A. Yes, sir."

And in this connection it is pertinent to review the following remarks of the trial court,

". . . The testimony of this witness (Lou Rodgers) shows throughout her direct and cross-examination the evidence is based upon her memory at the time she lived in that house, saw the equipment being installed and had an opportunity to see it, test it and describe it. Although she did make the statement in answer to Mr. Dwight that the entire statement made to the police was based on the equipment there in her presence, she also made the statement on redirect, in answer to Mr.

Young, that her testimony here in this Court was based upon her memory at the time she lived there. Certainly the Court, under the authority in the Silverthorne case, denies the motion."

that there was no connection between the alleged incident at the police station and the testimony given at the trial. (Rec. p. 160.)

(2) Concerning Assignment of Error V

John Kiehm's testimony (the subject matter of Assignments of Error No. V) on this issue is clarified by the testimony given on redirect examination as follows:—

"Redirect Examination by Mr. Young (Rec. p. 192):

Q. Mr. Kiehm, everything you have testified to here this morning is from your own memory of what happened?

A. Yes, from my own memory.

Q. And what you put in the house?

A. Yes.

Q. And that was not influenced in any way by what the police told you?

A. No."

And again the remarks of the trial court are pertinent as showing the absence of any effect on this witness' testimony (Rec. pp. 201-2):

"Witness Kiehm also testifies from his independent knowledge, free and clear of the illegal search and seizure. His knowledge of how the electrical equipment looked and how it was put in and installed was based upon his actual experience

and personal knowledge thereof. Here again the mere fact that he was shown that equipment, which had been illegally seized, is not enough to bring his independent personal knowledge of that equipment within the ruling of this Court in respect to the illegally seized evidence, as was definitely stated in the Silverthorne case in 251 U. S. at page 392, (reading) . . . which in that case was copies of papers illegally seized. Here the evidence of Rodgers and Kiehm was gained from an independent source and that may, therefore, be proved like any other evidence based in this case upon their personal and independent knowledge and clearly not solely gained by the government's own wrong nor dependent upon that wrong. Consequently, the Court overrules the defendant's motion to strike this evidence."

(3) Concerning Assignment of Error VI

The record of the testimony of Billie Florence Penland on this issue (complained of in Assignment of Error No. VI) reveals that on redirect examination she testified at the trial from her memory as to what she knew of the equipment in the defendant's house.

"Q. Now, everything that you have testified here this morning, is that based on your memory of what happened that night?

A. Yes, sir.

Q. I understand from your cross-examination you were a bit hesitant down the police station to testify or give a statement about 'Speed' Warren because she had been good to you and you wanted to protect her?

A. Yes, sir.

Q. You finally gave a statement?

A. Yes.

Q. Is that statement the truth?

A. Yes, sir.

Q. Based upon your memory of what happened that night?

A. Yes, sir." (Rec. p. 349).

(4) The Police Source of Information Was Prior to and Independent of the Illegal Search

The record also shows that the Police Department had knowledge of the nature of the device which caused the death of Wah Choon Lee prior to the time that the illegal search and seizure as ruled by the trial court was made. (Rec. pp. 404, 406, 440-41.)

The evidence is uncontradicted that the witnesses Penland, Officer Burns and Lou Rodgers were present in the house when the death occurred. Also the sudden nature of the deceased's fatal injury (Rec. p. 404) together with the discovery at the time, of an electric wire soldered to the metal plate on the door which the deceased touched, by Officer Caminos (Rec. p. 406) proves that the police had a source of information to investigate, as to the cause of the deceased's death, independent of the knowledge obtained from the subsequent search and seizure.

(5) Summary

Summarizing the facts then, it is clear (1) that the police obtained the identity of the witnesses present (whose testimony is complained of in the above Assignments of Error) at the scene of the killing without the

aid of the illegally seized evidence; (2) that the police had knowledge of the death of the deceased and the general nature of the electrical equipment causing the deceased's death before the illegal search and seizure was made; (3) that the witnesses, whose testimony is complained of, obtained their knowledge and information from their observation and experience with the equipment prior to the illegal search and seizure; and finally the testimony of these witnesses given at the trial was not influenced in any manner by what transpired at the Honolulu Police Station after the search and seizure.

This is directly contrary to the statement made in the Appellant's Brief (p. 35) that the government had no knowledge of the existence of the electrical equipment until it was illegally seized. It is therefore apparent that either the Appellant is erroneously proceeding upon the theory that the government did not have any independent knowledge of the electrical equipment or else she is evading the facts as they appear in the record quoted above.

C

Discussion of Appellant's Authorities

Appellant relies upon *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 64 L. Ed. 319, 24 A.L.R. 1426, 40 Sup. Ct. 182, but that case has no application to the case at bar. In that case the court found that, without a shadow of authority, the government officers had made a clean sweep of all the books, papers, and docu-

ments in the office of the company while its officers were under arrest. Although the court later ordered their return, these documents were copied and photographed, and on the basis of knowledge obtained from them the government issued a subpoena to compel the production of the originals. The Supreme Court in holding invalid the subpoena held that the government could not, while in form repudiating the illegal seizure, maintain its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had. In other words, that case held that the government could not use information which came from the source of the illegal search and seizure, and the court indicated and limited its holding as follows, at page 392 (L. Ed. p. 321):

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others,* but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." (Italics ours.)

The Appellant relies (Brief, pp. 33, 34) on the case of *Nardone v. U. S.,* (Advance Op.) 84 L. Ed. 227; 302 U. S. 379, 82 L. Ed. 314; 106 Fed. (2d) 41. From a reading of these opinions and principally the last case, to-wit, in *84 L. Ed. 227,* it is clear that they do not support the contention of the Appellant. There the Supreme Court of the United States was primarily concerned with the question of whether or not evidence obtained as a direct result of illegal wire-tapping was admis-

sible. No situation existed in those cases as in the case at bar of an absolutely independent source of information. In fact, it is interesting to read the following statement in *84 L. Ed. 227,* (Advance Op.) where the court in discussing the doctrine of the independent source stated, page 229:

> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

D

Appellee's Authorities

Exactly what is a source independent of the illegal search and seizure does not clearly appear in the *Silverthorne case, supra,* it would seem however, that question would necessarily depend upon the facts and circumstances of each particular case coming before the court. The following cases throw light upon the independent source doctrine set out in the Silverthorne case.

In *Cohen v. U. S.,* 36 Fed. (2d) 461 (3rd C.C.A. '29), cert. denied 281 U. S. 742, 74 L. Ed. 1156, 50 S.Ct.Rep. 348 the defendant was convicted of the crime of perjury. He assigned as error the admission into evidence of the testimony of one Charles Klein, assistant attorney general, which consisted of information of the existence of certain records which Klein had observed.

These records had been illegally seized by the government's agents and suppressed by the trial court. Klein, although instrumental in the prosecution of the case and knowing of the issuance of the illegal search warrant, was not present when the records were discovered by the searchers but was called to the house after the records were discovered by the searchers and invited into the house and shown the records by one Albus, who was in control of the premises.

The defendant contended that under the doctrine of the Silverthorne case, supra, Klein should have been deemed in law to be a member of the searching party; that he gained admittance to the Appellant's residence by virtue and under the authority of the illegal warrant; and that under the law the evidence obtained, *either directly or indirectly,* by an unlawful search and seizure must be suppressed. The court, in holding Klein's testimony admissible said in part, pp. 463-4:

> ". . . there was a mental connection between the illegal search and seizure and Klein's subsequent actions. There must be an actual connection. Klein was not directly or indirectly a member of the searching party, nor did he enter the house under authority of the illegal search warrant. However unfortunate for Cohen, he entered upon invitation of one of the occupants, who, without any request from Klein, took him to the cellar where the incriminating property was concealed. Thus Klein entered and made his discovery by reason of the actions of Albus, lawful because done in his own home and lawful also because not associated with the search. The fact that Klein obtained and was allowed to produce evidence which

the officers operating under an illegal search warrant obtained but could not testify to does not answer the question whether Klein's testimony should also have been suppressed. The question turns on the lawfulness of Klein's entry into Cohen's home and, when there, the lawfulness of his discovery. We find both were lawful and the evidence was admissible."

In *Wiggins v. U. S.*, 64 Fed. (2d) 950, (9th C.C.A. '33), cert. denied 290 U. S. 657, 78 L. Ed. 569, 54 S.Ct.Rep. 72, the defendant was charged with evasion of income tax. The government agents obtained information as to the facts of the offense from two sources, namely, (1) seizure of the defendant's books at his office during his absence, and (2) testimony of the defendant's nurse and secretary who was incidentally the informant in the case. From the knowledge based on the information obtained from these two sources, the government agents obtained a confession from the defendant. The court, in commenting upon the defendant's objection that the confession was obtained by means of knowledge obtained from the unlawful search and seizure of his books, said at page 951:—

"Although defendant has abandoned his objection to the admission of the confession made on the ground that the interrogation by the government agents was based on information obtained by them without his knowledge, through the alleged illegal search and seizure hereinabove referred to, it should be noted that the officials had received similar information from defendant's secretary; this alone sufficed as a basis for their questions. Cf. *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385,

392, 40 S.Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426 (1920)."

It is to be noted that the court cited the *Silverthorne Lumber Co. case, supra,* and although this language was obiter dictum, it illustrates the application of the independent source doctrine which we quote again in the language of the Silverthorne case,

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

In the case at bar the police authorities had knowledge from three sources, to-wit, (*a*) knowledge obtained from the search and seizure of the existence of the equipment, and (*b*) knowledge obtained from witnesses, Lou Rodgers, John Kiehm, Billie Florence Penland and Lucy McGuire, as to the installation and presence in the Appellant's house of this equipment; (*c*) Knowledge obtained from their presence and *observation at the scene of the homicide.*

It is respectfully submitted that the mere fact that the police had the information obtained from the search and seizure at the time when they checked and questioned the witnesses, their other source of the information, does not make the testimony of these witnesses inadmissible, because such testimony under all the facts came from an absolutely independent source.

To adopt such a rule of law, would in the words of Judge Seabury (24 Cornell L.Q. 376) give to these con-

stitutional provisions for the protection of liberty such fanciful and far fetched interpretations as to convert them into a weapon by which criminals can make war safely upon organized society and its law-abiding members.

POINT III

Where the Facts in the Record and the Assignments of Error Do Not Indicate How a Defendant Has Been Injured by the Application of an Alleged Unconstitutional Statute, the Court Will Decline to Pass on the Constitutionality of the Statute as an Abstract Proposition of Law.

A

Assignments of Error Covered

This point of law is applicable to the Appellant's Assignments of Error VII, VIII, IX, X and XI (Rec. pp. 24-33) in which the Appellant has raised the issue of the unconstitutionality of Section 5404 of the Revised Laws of Hawaii 1935.

B

The Territorial Supreme Court Declined to Pass on the Constitutionality of the Statute

The Supreme Court of the Territory of Hawaii in refusing to pass upon these assignments of error (Rec. p. 667) stated as follows:—

> "The constitutionality of section 5404, R.L.H. 1935, was not in issue and that question should not have been injected into the case. While prosecution's instructions numbers 12, 12A and 14 might

well have been refused by the court, their effect was to accord the defendant an advantage to which she was not entitled. But of this she cannot complain. For the same reason defendant's instructions numbers 16, 18 and 28 were properly refused."

In holding that the constitutionality of Section 5404 of the Revised Laws of Hawaii 1935 was not in issue under the facts of this case, the Supreme Court of the Territory adopted the view that instructions on the law of arrests without a warrant were inapplicable to the issues in the case because (1) the facts in the record could not in the remotest degree support a finding that the deceased was a trespasser at the time of his death (Rec. pp. 666-67) and (2) even under the assumed theory of the Appellant that the deceased was a trespasser, the Appellant under the applicable rule of law would not be justified in deliberately placing and using a deadly instrumentality on her premises in the manner shown by the evidence. (Rec. pp. 662-3.)

C

Appellant's Theory on Application of the Statute Complained of

The Appellant in her Brief (p. 40) argues that it was necessary under the issues to determine whether or not the deceased, a police officer, was lawfully upon the premises of the Appellant and that this question was dependent upon the right of a police officer to make an arrest without a warrant. The Appellant contends that although the trial court was correct in

instructing the jury on the law of arrests the trial court's rulings on the instructions complained of were erroneous because they were based upon Section 5404 of the Revised Laws of Hawaii 1935, which is unconstitutional.

D

Appellee's Contention

The Appellee contends that since neither the assignments of error involved or the Brief of the Appellant point out how she was directly injured under the issues in the case by the application of the statute attacked she has not properly raised the question of the constitutionality of the statute. Appellant is in effect seeking to have the court declare the statute unconstitutional as an abstract proposition of law.

No question is raised by the Appellant that there was any unreasonable arrest or attempt to arrest her in violation of her rights under the Fourth and Fifth Amendments of the Constitution of the United States. There being therefore no issue of an unlawful arrest it is difficult to see what difference the constitutionality of the statute would make in the case.

E

Authorities to Support Appellee

Courts will deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances.

Associated Press v. Nat. Lab. Bd., 301 U. S. 103, 57 Su. Ct. 650, 81 L. Ed. 953.

Constitutional questions are not to be decided hypothetically; nor abstractly.

Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 Su. Ct. 816, 81 L. Ed. 1143.

A court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it.

Tenn. Pub. Co. v. Am. Nat. Bank, 299 U. S. 18, 57 Su.Ct. 85, 81 L. Ed. 13.

Assailants of a statute on constitutional grounds must show the application of the statute and that they are thereby injuriously affected.

Thurston v. U. S., 241 Fed. 335 (5th C.C.A.) Cert. den. 245 U. S. 646, 62 L. Ed. 529.

Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70.

Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 80 L. Ed. 1155.

POINT IV

Section 5404 of the Revised Laws of Hawaii 1935 Does Not Contravene Amendment IV of the Constitution of the United States and Is Therefore Not Unconstitutional.

A

Assignments of Error Covered

This point of law, as well as Point III supra, covers Assignments of Error VII, VIII, IX, X and XI.

Assuming arguendo that a decision on the constitutionality of Section 5404 of the Revised Laws of Hawaii 1935 is necessary, both because it is in issue under the facts of the case, and also because Appellant has

pointed out under the facts how she was injured by the application of the statute, then the Appellee maintains that the statute is constitutional.

B

Appellant's Contention

Although the contention of the Appellant with reference to these Assignments of Error is not clearly perceived from a study of her Brief (pp. 40 to 49) it appears that the Appellant's position is that the statute is unconstitutional as violating the Fourth Amendment of the Constitution of the United States because (1) it authorizes a police officer to make an arrest without a warrant for a misdemeanor not committed in the officer's presence; and (2) because it fails to distinguish between arrests in case of felonies and arrests in case of misdemeanors (Appellant's Br. pp. 42-43).

C

Contention of Appellee

Appellee maintains (1) that the statute in question does not authorize a police officer to make an arrest without a warrant for a misdemeanor not committed in the officer's presence; (2) that the failure to distinguish in the statute between arrests in case of felonies and arrests in case of misdemeanors is not of itself a violation of the constitutional amendment claimed to be infringed.

The Appellee has no quarrel with any of the authorities cited by the Appellant in his argument or the prin-

ciples of law which these cases expound. Their citation however adds nothing to the issues herein.

Repeatedly Appellant has stated that the statute and the instructions complained of specifically authorize an arrest for a misdemeanor not committed in the officer's presence without a warrant. In fact, nowhere does language remotely similar appear in the statute or the instructions. The Appellant, rather by her construction has read this statement into the statute and the instructions. She is building a straw man and then proceeding to tear it down.

The Appellant in discussing Assignments of Error X and XI involving the refusal of the trial court to give the Appellant's requested Instructions 12 and 18 makes the statement (Appellant's Brief pp. 39-40), without support in the record, that the Appellee objected to the giving of these instructions to the jury (why the Appellee's objection in the trial court is material here is not clear) because they were in conflict with Sec. 5404, R.L.H. 1935. It would be more reasonable to presume that the instructions were refused, not because they did not expound correct principles of law, as far as they went, but rather because they were inapplicable to the issues—there being no claim in the case so far as Appellant or the deceased was concerned of an improper arrest.

We cannot follow the argument of Appellant on pp. 44-49. That argument is confusing and inconsistent especially in connection with the reference to In-

struction No. 34 (Rec. p. 46) which was not assigned as an error in this Appeal.

D

Appellee's Argument and Authorities

Before discussing the constitutionality of *Sec. 5404, R.L.H. 1935,* we set out for convenient reference the statute attacked and Amendment IV of the Constitution of the United States which the statute is alleged to have contravened.

Amendment IV of the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 5404, R.L.H. 1935 provides as follows:

> "Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense."

(1)

It is to be noted that there is no specific prohibition in the language of the Fourth Amendment of the Constitution of the United States against either an arrest

without a warrant or an arrest upon reasonable suspicion or probable cause.

It is the well settled law that the Fourth Amendment of the Constitution of the United States does not prohibit arrests without a warrant.

Carroll v. U. S., 267 U. S. 132, 69 L. Ed. 543.

Terr. v. Kataoka, 28 Haw. 173.

The only prohibition in the Fourth Amendment is against unreasonable searches and seizures and unreasonable arrests.

Lambert v. U. S. (9th C.C.A.), 282 Fed. 413.

Peru v. U. S. (8th C.C.A. '25), 4 Fed. (2d) 881.

Agnello et al. v. U. S. (2nd C.C.A.), 290 Fed. 671, reversed on another ground, 269 U. S. 20, 70 L. Ed. 145.

The court in *Lambert v. U. S., supra,* said on page 417:—

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure (or arrest) is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case." (Parenthetic matter ours.)

In order to determine what is an unreasonable arrest under the Fourth Amendment of the Constitution of the United States with respect to arrests for misdemeanors by a police officer, it is necessary to review the leading Federal cases.

That an arrest made for a misdemeanor without a warrant upon *mere suspicion* is unreasonable, we

agree is the settled law. (The jury in the case at bar, at Appellant's request, were so instructed, Rec. p. 600.)

Carroll v. U. S., 267 U. S. 132, 69 L. Ed. 543.

Equally well settled is the rule that an arrest without a warrant for a misdemeanor actually committed in the presence of an officer is reasonable and not a violation of the constitutional guarantees of the Fourth Amendment.

Carroll v. U. S., supra.

And it is likewise well established that when a police officer has probable cause to believe that a misdemeanor is being committed in his presence, he may make arrest without a warrant and such an arrest is reasonable. *That in such a case the probable cause which will justify arrest for a misdemeanor without a warrant must be a judgment based on personal knowledge acquired at the time through the senses, or inferences properly to be drawn from the testimony of the senses.*

Garske v. U. S. (8th C.C.A. '24), 1 Fed. (2d) 620.

Schroeder v. U. S. (9th C.C.A.), 14 Fed. (2d) 500.

Winkler v. U. S. (9th C.C.A.), 297 Fed. 202.

Agnello v. U. S., 290 Fed. 671.

6 C.J.S. 595.

In the case of *U. S. v. Rembert* (D.C. Tex. '22) 284 Fed. 996, the Court, after reviewing many authorities, said on page 1001:—

> "Now it appears from these decisions that it is not essential that, in making an arrest without warrant, the officer must absolutely know that an

offense is being committed; *he must believe it is being committed, and must believe upon the evidence of his own senses in the case of a misdemeanor*, and in the case of a felony upon credible evidence of other persons." (Italics ours.)

And again on page 1006:—

". . . . Wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, *or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief*, an arrest may be made without a warrant, and the instruments and evidence of crime seized." (Italics ours.)

To the same effect is the case of *U. S. v. Stafford* (D.C. Ky. '23) 296 Fed. 702, where the Court said on page 704:—

"Resort has to be had to the common law to determine that matter (whether an arrest is lawful); and according thereto, as stated, an arrest, and hence a subsequent search and seizure, is always lawful where a criminal offense is being committed in the officer's presence, and also, according thereto, such *an offense is so committed where things are observed by the officer which, viewed in the light of common knowledge, afford reasonable ground for suspecting that such is the case.*" (Parenthesis and italics ours.)

It can thus be seen from these Federal cases that although a police officer may not arrest for a misdemeanor not committed in his presence without a warrant *he may arrest for a misdemeanor without a warrant*

where he sees, hears or detects by his senses some act or acts committed in his presence which gives him probable cause or reasonable grounds to suspect that a misdemeanor is being or about to be committed. This law is perfectly consistent with Sec. 5404, Revised Laws of Hawaii 1935, Supra.

For an illustrative application of the statute to such a case see *Terr. v. Sing Kee,* 14 Haw. 586. In that case an arrest for unlawful sale of liquor (a misdemeanor) without a warrant was pronounced lawful by the court where the facts showed that the officers were fifty feet away from the store when they saw the defendant deliver a bottle of liquor to a person. The officers rushed in and arrested the defendant. Obviously from that distance they could not positively say that liquor had been sold in fact, but they certainly had reasonable grounds of suspicion.

See also as illustrative:

Forsythe et al. v. Ivey (Miss. '32), 139 So. 615.
Goodwin v. State (Tenn. '24), 257 S.W. 79.

For, as the Court in *Goodwin v. State, supra, at page 80,* said:—

". . . . His conduct was suspicious, and such as naturally to create the impression that he was intoxicated, thus affording *abundantly reasonable grounds for his arrest.* Although a man be in fact sober, if he so conducts himself in public as to justify the impression that he is drunk, whether he does so purposely or otherwise, he subjects himself to arrest, and the arrest is lawful." (Italics ours.)

A cursory examination of Sec. 5404, R.L.H. 1935, supra, will reveal that it does not state, as the Appellant contends, that an arrest can be made for a misdemeanor without a warrant upon mere suspicion, nor does it state that an arrest may be made without a warrant for a misdemeanor which is not committed in the officer's presence. It does state, however, that a policeman may arrest without a warrant "such persons as may be found *under such circumstances as justify a reasonable suspicion* that they have committed or intend to commit an offense." And this Court should give this phrase the construction which makes it conform to the constitutional requirement of reasonable arrests as outlined in the Federal authorities cited above, to-wit:—

That in the case of an arrest for a misdemeanor, the *circumstances* which will justify a *reasonable suspicion* must be acts or sense stimulants occurring within the sense perception of the arresting officer.

Since this construction is reasonable and explains and amplifies the statutory language directly preceding, to-wit, *"even in cases where it is not certain that an offense has been committed"* and will bring the statute in harmony with the Constitution of the United States and the decisions thereunder, this court should so construe this statute. If the statute is open to more than one construction that construction which renders it free from constitutional objection, if available, *must be adopted.*

Nat'l Labor Rel. Bd. v. Jones E.L.S. Corp., 301 U. S. 1, 81 L. Ed. 893.

(2)

We find it difficult to follow Appellant's argument that the statute in question is unconstitutional because it fails to distinguish between arrests in cases of felonies and arrests in misdemeanors. The contention is novel and unique. No authorities are set forth in support of it. It is clear that the Fourth Amendment to the Constitution of the United States requires no such distinction. Judicial construction of the Amendment has, it is true, laid down a different rule with reference to arrests without a warrant in misdemeanors and felonies. The rule is more stringent and rigid in its requirements with reference to misdemeanors. Section 5404 of the Revised Laws of Hawaii 1935, being valid with reference to misdemeanors, under the authorities cited (pp. 38-43 herein), it certainly can be no objection that the statute applies the same rigid requirements to arrests in cases of felonies.

In conclusion, it is important to note that the statute in question has been in effect in the Territory of Hawaii for many decades. It is found in the Penal Code of 1869. In addition the Supreme Court of the Territory of Hawaii has in the following cases acted under this statute:—

Terr. v. Hoo Koon, 22 Haw. 597.

Terr. v. Sing Kee, 14 Haw. 586.

Prov. Gov't v. Caecires, 9 Haw. 522.

The fact of the law having stood so many years without challenge gives a presumption in favor of its constitutionality, besides the general presumption that way in favor of statutes.

Marx v. U. S. (9th C.C.A. '38), 96 Fed. (2d) 204.

We respectfully submit that the statute upon its face and as applied to the facts and issues in this case is not in violation of the Fourth Amendment of the Constitution of the United States.

CONCLUSION

It is therefore respectively submitted that the appeal should be dismissed for want of jurisdiction, or the judgment appealed from affirmed.

Dated at Honolulu, T. H., this 3rd day of October, A. D. 1940.

Respectfully submitted,

(s) Chas. E. Cassidy

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Due service and receipt of three copies of the within Brief is hereby admitted this 3rd day of October, 1940.

(s) Charles B. Dwight

Attorney For Appellant.